"(d) That my objects in so doing was for India's freedom and my freedom (domestic) too.

"(e) That I came into India in 1943 equipped for underground activities and fell into the hands of law after a short while and detained in Delhi till the end of war."

In cross-examination he stated that when he went to India he held a British passport although he did not take it with him. He stated that he never worked against the British Government but nevertheless that he was sent to India in a Japanese submarine for the purpose of undertaking underground activities in India for the independence of India and that he was equipped for such activities against the Government of India. Having landed surreptitiously in India he did not report to the British authorities. Subsequently, he was interned and there is no evidence to show what he had been doing in India in the meantime. In these circumstances I find that when the defendants became aware of the activities of the plaintiff during the war they were entitled to dismiss him summarily, and therefore, even if I am wrong in regard to the question of frustration, I should dismiss his claim for damages for wrongful dismissal. At the same time, if there was no frustration, his dismissal did not take place until January, 1949, and I would hold that in those circumstances he would be entitled to salary for the period of April, 1946 to January, 1949. There is no evidence before me on which I could accurately assess the amount of salary which would be due to him in the event of there having been no frustration of the contract and I should find it necessary to refer the matter to the Registrar to hold an enquiry as to the amount which would be due.

Judgment accordingly.

CHIN CHAM SEN v. FOO CHEE SANG & ANOR.

[App. Civ. Juris. (Thomson, J.) April 28, 1952]

[Ipoh — Civil Application No. 48 of 1951]

Costs — Getting up fee — Discretion of the taxing officer — Principles by which the taxing officer should be guided — 1932 Rule No. 4 item 86.

In allowing the amount for getting up fee the taxing officer should be chiefly guided by the amount at stake and the importance of the issue involved.

Cases referred to:—

(1) *A. M. M. Murugappa Chettiar v. S. Seenivasagam Chettiar* (1940) M.L.J. 108; (1939) F.M.S.L.R. 121.

(2) *Malayan Trading Co. & Anor. v. Lee Pak Yin* (1941) M.L.J. 207; (1940) F.M.S.L.R. 308.

(3) *In the Estate of Ogilvie* (1910) P. 243.

(4) *Corbett v. Ipoh Tin Dredging Ltd.* (1936) M.L.J 278; (1936) F.M.S.L.R. 160.

(5) *Re Kana Moona Syed Abubakar decd.* (1940) M.L.J. 4.

(6) *Beavis v. Foo Chee Fong* (1938) M.L.J. 129.

(7) *Slingsby v. Attorney-General* (1918) P. 236 at 239.

APPEAL against the decision of the Taxing Master.

S. P. Seenivasagam for the applicant.

B. K. Das for the respondents.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J. : — This is an appeal against the decision of the Senior Assistant Registrar allowing certain costs on taxation to the present respondent.

Some time ago, the respondent applied to the Rent Assessment Board for permission to eject the appellant from certain premises, the monthly rental of which was $50. That application was successful. The appellant being dissatisfied with the decision of the Board, took steps to have it quashed by way of *certiorari*. To that end he commenced proceedings by notice of motion dated 3rd December, 1951. The matter was set down for hearing on 14th January, 1952, but on 27th December, 1951, the appellant's solicitors informed the respondent's solicitors that they would not be proceeding further in the matter and that the application for *certiorari* would be withdrawn when it came on for hearing on 14th January. The application was duly withdrawn and the appellant was ordered to pay the respondent's taxed costs.

In due course the respondent's solicitors brought in for taxation their Bill of Costs which without the addition of the percentage increases amounted to $693. The largest item, and the only one with which I am concerned here, was a getting up fee under item 86 of $600. The taxation took place before the Senior Assistant Registrar and in addition to two trifling deductions with which I am not here concerned he taxed off $200 from the fee claimed under item 86 allowing that fee at $400 and the total amount of profit costs at $466. The percentage increases of 25 per centum and 50 per centum and the disbursements were then

added to the profit costs and the whole bill was taxed and allowed at $896.

Against so much of the Registrar's decision as relate to the fee allowed under item 86 the appellant has appealed on the ground that the sum of $400 should be reduced or, alternatively, that it should not be subject to the percentage increases.

I will deal in the first place with the question of the percentage increases. On this question there would appear to be some conflict of authority. In a taxation appeal arising out of Ipoh Civil Suit No. 368/50, Hill, J., decided that the percentage increases must be added to any fee allowed under item 86. In an earlier taxation appeal arising out of Selangor Civil Suit No. 50/50, Taylor, J., would appear to have decided that they should not be added in the case of item 86 and other discretionary items. If there be a conflict of authority, it can only be resolved by the Court of Appeal. Until, however, it is resolved, I find myself compelled to agree with what was decided by Hill, J., rather than with what is thought to have been decided by Taylor, J.

The question of costs in the Supreme Court is dealt with by 1932 Rule No. 4 (G.N. 9452/32) and the material portions of item 86 of the Schedule to that Rule read as follows :—

> 86. The Registrar may allow a general fee for instructions for trial, for attendances upon witnesses, procuring evidence, considering authorities and getting up the case having regard to all the circumstances."

By 1933 Rule No. 1 (G.N. 2790/33) it is provided that "there shall be added to the profit costs and fees which advocates and solicitors shall be entitled to charge and be allowed pursuant to 1932 Rule No. 4 a sum equal to twenty-five per centum thereon" and by 1947 Rule No. 2 (G.N. 8181/47) paragraph 2, "there shall be added to the profit costs and fees charges and allowed in accordance with the schedule to 1932 Rule No. 4 as amended by 1933 Rule No. 1, a sum equal to fifty per centum of total of such profit costs and fees."

I do not think it is open to argument that profit costs and fees includes all charges to which a solicitor is entitled by way of remuneration for his services, that is to say, all charges which he is entitled to recover otherwise than in respect of disbursements made by him, and in respect of such charges the terms of the two Rules allowing the percentage increases are clearly mandatory. Such was the opinion of Hill, J., in the case I have quoted. In the two cases of *A. M. M. Murugappa Chettiar v. S. Seenivasagam Chettiar*[1] and *Malayan Trading Co. & Anor. v. Lee Pak Yin*[2] Gordon-Smith, J., who was in these cases concerned with other questions of costs, treated the proposition as self-evident and in the Selangor case to which I have referred Taylor, J., would seem to have treated the proposition as leading in the circumstances with which he was there concerned to inconvenient results rather than as erroneous.

I must, therefore, hold that in the present case the Registrar was bound to apply the percentage increases to the total amount of profit costs and fees allowed by him. I would add, however, that the difficulty which would appear to have arisen in the matter disappears when it is appreciated that in deciding what amount he will allow under such discretionary items as item 86 the taxing officer must bear in mind that in the event the amount allowed by him will be increased by 87½% and that he must take that fact into consideration in making his original allowance. I base that proposition on the following argument. It is clearly the intention of the Rules that where the taxing officer is given a discretion he must exercise that discretion in a reasonable way so as to make the solicitor a reasonable allowance for the work done by him. The question is not an academic one. It is a practical one of dollars and cents. If the taxing master disregards the percentage increase and allows in the body of the Bill a sum in itself representing a reasonable allowance then in the event he is actually making an allowance of almost double the amount which he himself has considered reasonable, a result which is so absurd as to render untenable any view of the process of taxation which leads to it.

I now turn to a consideration of the first ground of appeal which is in effect that the amount of $400 allowed in the body of the Bill under item 86 is excessive and in this connection I would observe that it follows from what I have said that what was in truth allowed was not $400 but $400 increased by 87½%, that is $750.

It is well-settled in England that as a general rule the Court will not interfere with the discretion of a taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises (see *In the Estate of Ogilvie*[3]). If the matter were at large I should be prepared to consider whether the English authorities on the point were wholly applicable in this country in view of differences in the local circumstances. It is not, however, at large for it has in effect been held that the local law on the point is substantially the same as that in England (see

Corbett v. Ipoh Tin Dredging Ltd.[4] and *Re Kana Moona Syed Abubakar deceased*[5]). Indeed there are certain *dicta* in the judgments of Aitken, J., in both the cases cited which might be construed as meaning that the discretion of the taxing officer was even less open to be interfered with by the Court than in England, but I think that these *dicta* are probably to be regarded as connected with the particular facts of the cases in question and not to be regarded as laying down any principle of general application.

The present appeal must therefore fail unless I am satisfied that the taxing officer has acted upon some wrong principle or has failed to consider some relevant consideration.

The taxing officer's discretion is thus dealt with in 1932 Rule No. 4 para. 58 :—

"As to all fees or allowances which are discretionary the same shall, unless otherwise provided, be allowed at the discretion of the Registrar, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the advocate and solicitor, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances."

The question of the exercise of that discretion in relation to getting up fees was considered by Terrell, J., in Singapore (where the local law is the same as here) in the case of *Beavis v. Foo Chee Fong*[6]. His Lordship having observed that "the getting up fee should bear some relation to the amount, and the importance of the issue involved, and generally speaking $500 is an extreme figure for the getting up fee where the amount at issue is less than $5,000, whatever be the work involved" went on to say :—

"In arriving at the amount of the getting up fee I do not think it desirable to enquire from Counsel the number of days and hours during which he is engaged in the work. I think it is almost impossible to give a correct answer. The proofs of witnesses are of course relevant, and so are the issues of law involved, but I think that a taxing master should be chiefly guided, as I have said, by the amount at stake and the importance of the issues involved."

I am not allowing myself to be unduly influenced by Terrell, J.'s reference to the sum of $500. I do not imagine for a moment that His Lordship intended to refer to that amount otherwise than by way of illustration. I accept, however, as an interpretation of the Rule which I have quoted that the principal consideration which must affect the taxing officer in the exercise of his discretion is the value and importance of the issues involved.

Considering the facts of the present case, it seems to me that the taxing officer has been unduly influenced in the exercise of his discretion by the value of the amount of work done (regarding which I am not prepared for one moment to quarrel with his opinion) and has not paid sufficient regard to the value and importance of the matters in issue. In saying so, I am to some extent (though I trust not unduly) influenced by what he has said in his grounds of decision. He says that he has examined the notes made by counsel in the course of his preparation of the case, and that he was satisfied that a considerable amount of work had been done. He concluded that he had not been overgenerous. Nowhere does he refer to what was actually at stake in the proceedings. Moreover, when I apply my own mind on the one hand to the amount of the fee allowed and on the other hand to what was involved in the litigation I am bound to think that the omission of all mention of this latter consideration from the taxing officer's stated grounds of decision is not accidental but reflects a substantial failure on his part adequately to apply his mind to it and in that connection I would refer to the following observations of Swinfen Eady, L.J., in *Slingsby v. Attorney-General*[7] :—

"The decision of the taxing Master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise."

Here, the litigation commenced as proceedings before the Rent Assessment Board for permission to eject the appellant from premises the monthly rental of which was $50. These proceedings were a necessary step preliminary to taking actual ejectment proceedings and it is important to observe that these ejectment proceedings would in themselves have been within the jurisdiction of the Magistrate's Court and that they could not have been brought in any higher Court without the person bringing them being heavily penalised as to costs. The costs allowed in respect of any such proceedings in the Magistrate's Court would have been comparatively trifling (see Subordinate Court Rules, 2nd Schedule) as would have been those allowed in respect of any appeal to this Court from any decision of that Court.

I do not suggest for one moment that *certiorari* proceedings here should as regards costs be treated as altogether analogous with proceedings by way of appeal from a lower Court. Nevertheless, the application for *certiorari* was in effect an attempt to appeal from a decision of the Rent Assessment Board

and that decision related to a subject matter the value of which was in the estimation of the Legislature so low that the subsequent Court proceedings to which the decision of the Rent Assessment Board was a necessary preliminary were of necessity to be taken in a subordinate Court.

In all the circumstances of the case, I am forced to the conclusion that had the taxing officer allowed his mind to be influenced by the considerations as to the nature of the proceedings and the value and importance of their subject matter which I have set out he would not have allowed such a large fee as he did allow. The appeal is accordingly allowed and the amount of the fee under item 86 reduced to $200, that is in fact $375 when effect has been given to the percentage increases. Costs of this appeal will follow the event.

Appeal allowed.

TAN KIM MOEY (f) v. KEE BAN CHENG.

[Court of Appeal (Sir Charles Murray-Aynsley, C.J., Singapore, Pretheroe and Spenser Wilkinson, JJ.)
May 2, 1952]

[Penang — F.M. Civil Appeal No. 21 of 1951]

Dealings in Land (Occupation Period) Ordinance, 1949 s. 12 — Sale under duress — Vendor and purchaser — Constructive notice — Conveyancing and Law of Property Ordinance (Cap. 118), s. 70.

This was an appeal against the judgment of Jobling, J. reported in (1951) M.L.J. 82 — sub nomine Kee Ban Cheng v. Tabayashi Toyoji & Anor.

The Court of Appeal dismissed the appeal on two grounds — Firstly that the first defendant's title was rightly declared void on the ground of duress and in any event, the title of second defendant was void by Statute.

COURT OF APPEAL.

F. G. Pooley for the appellant.

C. D. D. Hogan for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Sir Charles Murray-Aynsley, C.J. : — These proceedings arise out of two dealings with land during the occupation period. The first was a sale by the plaintiff-respondent to one Tabayashi Toyoji, a Japanese, on behalf of a Japanese company. This Japanese was made a defendant in the Court below but he was not served and has disappeared since the end of the occupation. Later the Japanese company entered into a contract of sale of the same land to one Teh Chooi Lai who resold it to the second defendant. On July 26th, 1945, the Japanese company entered into a contract of sale of the land with the second defendant. This contract was performed by the company by means of a conveyance dated August 26th, 1945. This dealing was declared void by section 12 of the Dealings in Land (Occupation Period) Ordinance No. 40 of 1949.

The plaintiff sought to have the sale to the Japanese set aside on the ground of duress. It should be noted that neither side has a legal estate. That is outstanding, since the Custodian has disclaimed in the first defendant. The second defendant claims to be a *bona fide* purchaser without notice.

The learned Judge decided the case on the ground of constructive notice. It is clear that on the sale to the second defendant the usual investigation of title took place. This did not, of course, reveal the circumstances of the earlier sale by the plaintiff.

The learned Judge considered that, in the circumstances of the occupation, special enquiries should have been made about the earlier transaction. As they were not made he found in favour of the plaintiff.

On the evidence before him. I am doubtful if this was a correct decision. I am doubtful if during the occupation it would have been possible to make the enquiries, or, if they were made, anyone would have dared to complain of duress. One is naturally chary about extending the scope of construction notice.

I think, however, that the decision can be supported on other grounds. I do not think that the defence of *bona fide* purchaser can avail to one who has not got the legal estate. In any event the dealing in its final form has been avoided by statute. When this has happened the second defendant cannot rely on the contract which was merged in the conveyance. To decide otherwise would be, in effect, to give effect to a dealing which has been avoided by statute. I think that contract and conveyance constituted one dealing and the date of the dealing is that of the conveyance.

The appeal should be dismissed with costs.

Pretheroe, J. : — The essential facts in this case are few in number. At the beginning of the Japanese occupation of Malaya the plaintiff was the owner of certain properties in Province Wellesley. On the 1st November, 1943, he conveyed these properties to a civilian Japanese who was working at Butterworth at the time. That Japanese is the first defendant in this case. In August, 1945, the first defendant agreed to sell the same properties to one Teh Chooi Lai. The latter immediately resold the properties to one Tan